Supreme Court, U.S.
FILED
MAR 8 1993
OFFICE OF THE CLERK

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

BARBARA MARTIN ELLIOTT, PETITIONER

v.

FAE A. MORELAND, INDIVIDUALLY AND AS COUNTY CLERK OF WASHINGTON COUNTY, OKLAHOMA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioner

QUESTIONS PRESENTED

Whether lack of timeliness alone is sufficient reason to deny a motion for leave to amend a complaint made under Rule 15(a), Federal Rules of Civil Procedure, after dismissal granted pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted, where there is no finding by the Court of undue delay, bad faith or dilatory motive; repeated failure to cure deficiencies; undue prejudice to the opposing party; or futility of the amendment.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

No._____

BARBARA MARTIN ELLIOTT,

Petitioner,

v.

FAE A. MORELAND, INDIVIDUALLY AND AS COUNTY CLERK OF WASHINGTON COUNTY, OKLAHOMA,

Respondent.

Petition for Certiorari

The Petitioner, Barbara Martin Elliott, respectfully prays that a Writ of Certiorari issue to review the Order and Judgment of the United States Court of Appeals for the Tenth Circuit entered December 8, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals, (Appendix A, *infra*, pages A-1 to A-5) is unreported. The District Court's Order Overruling Motion For Leave To Amend Complaint (Appendix B, *infra*, pages B-1 to B-5) is unreported. The District Court's Order [dismissing suit] (Appendix C, *infra*, pages C-1 to C-8) is unreported.

JURISDICTION

The Order and Judgment of the Court of Appeals (Appendix A, *infra*, pp. A-1 to A-5) was entered December 8, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND FEDERAL RULES OF CIVIL PROCEDURE PROVISIONS INVOLVED

The pertinent provisions of the statutes and rules involved are set forth in Appendix F, *infra*, pp. F-1 to F-4). They include 28 U.S.C. § 1254(1), 28

U.S.C. § 1291, 28 U.S.C. § 1331, 28 U.S.C. §1343(3), 29 U.S.C. § 794, 42 U.S.C. § 1983, and Rule 15(a), Federal Rules of Civil Procedure.

STATEMENT

Petitioner, Barbara Martin Elliott, a hearing impaired person, filed her Complaint on December 4, 1989, (Appendix D, *infra,* pp. D-1 to D-8) seeking to recover damages and other relief from Respondent, Fae A. Moreland, who was sued individually and as County Clerk of Washington County, Oklahoma, arising out of the discharge of petitioner from her employment as a Deputy County Clerk which had occurred on December 4, 1987, and was effective December 31, 1987. In her original complaint, petitioner alleged causes of action under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the Constitution of the United States as

well as pendent state law claims for wrongful discharge in violation of public policy.

Respondent filed a Rule 12(b)(6) motion to dismiss. Petitioner did not respond in the time permitted by local rules. On June 6, 1990, the district court entered its order (Appendix C, *infra,* pp. C-1 to C-8) dismissing petitioner's complaint and action for failure to state a claim upon which relief can be granted. No responsive pleading was ever filed by the respondent.

One year later, on June 6, 1991, petitioner filed her Motion for Leave to Amend Complaint (Appendix E, *infra,* pp. E-1 to E-2); a brief in support thereof (Appendix E, *infra*, pp. E-3 to E-17) and tendered a proposed Amended Complaint (Appendix E, *infra,* pp. E-18 to E-30) which cured the objections to the original

complaint which, admittedly, had been deficient in several respects.

On December 5, 1991, the district court entered its Order (Appendix B, *infra,* pp. B-1 to B-5) denying petitioner's motion for leave to amend complaint and petitioner appealed to the United States Court of Appeals for the Tenth Circuit. The Court of Appeals affirmed (Appendix A, *infra,* pp. A-1 to A-5) holding, consistent with its recent published opinions, that "untimeliness alone may be a sufficient basis for denial of leave to amend." Las Vegas Ice & Cold Storage Co. v. Far West Bank, 893 F.2d 1182, 1185 (10th Cir.1990) and First City Bank, N.A. v. Air Capitol Aircraft Sales, Inc., 820 F.2d 1127, 1133 (10th Cir. 1987).

EXISTENCE OF JURISDICTION BELOW

Petitioner timely filed her action in

the United States District Court for the Northern District of Oklahoma on December 4, 1989. The action was brought under 42 U.S.C. § 1983. While not specifically cited in the original complaint (Appendix D), the Amended Complaint (Appendix E, *infra*, pp. E-18 to E-30) included, as the original complaint should have, a reference to 29 U.S.C. § 794. Jurisdiction was alleged under 28 U.S.C. §§ 1331 and 1343(3).

Subsequent to the denial of petitioner's motion for leave to amend complaint filed after dismissal, petitioner filed a notice of appeal to the United States Court of Appeals for the Tenth Circuit under the authority of 28 U.S.C. § 1291.

REASONS FOR GRANTING THE PETITION

In Foman v. Davis, 373 U.S. 178, 182, (1962), this Court enunciated the

standards for motions to amend under Rule 15(a), Fed.R.Civ.P. This Court pointed to the language in Rule 15(a) that leave to amend "shall be freely given when justice so requires." The Court further stated that "this mandate is to be heeded." The goal is for plaintiff to be able to test his claim on the merits if the underlying circumstances may be the proper subject of relief. The Court identified several reasons that would justify denial of the motion to amend: "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party" and "futility of amendment." In the absence of these, the leave should be "freely given."

As noted in the Statement, *supra* at page 5, the Court of Appeals for the Tenth

Circuit has, in its recent decisions in cases involving Rule 15(a), held that lack of timeliness alone is sufficient reason to deny a motion to amend complaint. Las Vegas Ice & Cold Storage Co. v. Far West Bank, 893 F.2d 1182, 1185 (10th Cir. 1990) and First City Bank, N.A. v. Air Capitol Aircraft Sales, Inc., 820 F.2d 1127, 1133 (10th Cir. 1987). This "untimeliness alone" standard was applied by the Court of Appeals in affirming the district court's denial of petitioner's motion for leave to amend complaint (Appendix A, *infra*, pp. A-1 to A-5). The application of this standard places the Tenth Circuit in distinct and direct conflict with the Courts of Appeals of several of the other Circuits in the interpretation of and the decisions under Rule 15(a).

In the Fifth Circuit, it has been held that where leave to amend after

dismissal was sought within a reasonable time under the circumstances, and the non-moving party was not going to be prejudiced, denial of leave to amend was an abuse of discretion. Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594 (5th Cir. 1981).

The Sixth Circuit has held that delay that is neither intended to harass nor causes any ascertainable prejudice is not a permissible reason, in and of itself, for disallowing an amendment to a pleading. Tefft v. Seward, 689 F.2d 637 (6th Cir.1982).

The Eighth Circuit has ruled that delay in filing an amendment to a complaint was not the controlling issue, but prejudice was the touchstone. Chesnut v. St. Louis County, Missouri, 656 F.2d 343 (8th Cir. 1981). See also Wilburn v. Pepsi-Cola Bottling Co. of St. Louis, 494

F.2d 1288 (8th Cir.1974).

The Ninth Circuit has held that delay alone does not provide sufficient grounds for denying leave to amend, but prejudice to the opposing party, whether the amendment is frivolous, dilatory or filed in bad faith, are all factors to be considered in deciding whether to grant leave to amend. Hurn v. Retirement Fund Trust of the Plumbing, Heating & Piping Indus. of So. California, 648 F.2d 1252 (9th Cir.1981).

Finally, the District of Columbia Circuit has held that the district court abused its discretion to the extent that it relied upon a lack of timeliness to justify its refusal to grant leave to amend in Yellow Bus Lines, Inc. v. Local Union 639, 883 F.2d 132 (D.C. Cir. 1989). In Yellow Bus, as here, no prejudice to the opposing parties was found by the

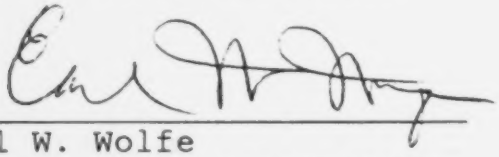
district court and, under those circumstances, the amendment should be permitted.

There is, therefore, a conflict in the decisions of the Tenth Circuit as opposed to the decisions of the Fifth, Sixth, Eighth, Ninth and District of Columbia Circuits on the subject of application of Rule 15(a) to a motion for leave to amend. In view of this conflict, this Court should grant certiorari to resolve the conflict in the Circuits over this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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March 8, 1993

CERTIFICATE OF MAILING

I hereby certify that on this 8th day of March, 1993, a true and correct copy of the above and foregoing Petition for Writ of Certiorari was deposited in the United States Mail with first class postage thereon fully prepaid to the following attorneys:

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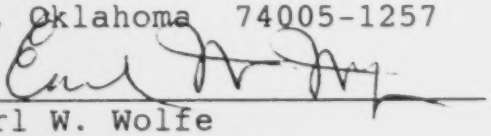

Earl W. Wolfe

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BARBARA MARTIN ELLIOTT, Plaintiff-Appellant,	)	
v.	)	No. 92-5010
FAE A. MORELAND, individually and as County Clerk of Washington County, Oklahoma, Defendant-Appellee.	)	(D.C. No. 89-C-0115-B) (N.D. Okla.)

ORDER AND JUDGMENT*[1]

Before BALDOCK and SETH, Circuit Judges, and BABCOCK,** District Judge.

**Honorable Lewis T. Babcock, District

[1] This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Judge, United States District Court for the District of Colorado, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9., The case is therefore ordered submitted without oral argument.

Plaintiff appeals from the district court order denying her motion to amend the complaint, under Fed. R. Civ. P. 15(a), one year after that court dismissed all of her causes of action. This court will not disturb the district court's disposition of a motion to amend absent an abuse of discretion. Woolsey v. Marion Lab., Inc., 934 F.2d 1452, 1462 (10th Cir. 1991).

Plaintiff filed her complaint on December 4, 1989. Following service of the complaint, defendant, on January 10, 1990, filed a motion to dismiss. On June 6, 1990, after plaintiff had failed to appear at a scheduling conference and had failed to respond to the motion to dismiss, the district court dismissed all of plaintiff's claims. One year after that dismissal, plaintiff filed her motion for leave to amend her complaint, asserting that she had failed to take any action in the case up until that time due to her attorney's "extreme" workload and conflicting court schedules. The district court denied leave to amend based upon plaintiff's undue delay in asserting the motion. Plaintiff appeals.

"In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of

the movant, . . . , etc. - the leave sought should, as the rules require, be 'freely given.'" Foman v. Davis, 371 U.S. 178, 182 (1962); see also Triplett v. Leflore County, 712 F.2d 444, 446 (10th Cir. 1983). Nonetheless, "[u]ntimeliness alone may be a sufficient basis for denial of leave to amend." Las Vegas Ice & Cold Storage Co. v. Far West Bank, 893 F.2d 1182, 1185 (10th Cir.1990). Further, "a district court acts within the bounds of its discretion when it denies leave to amend for 'untimeliness' or 'undue delay.'" First City Bank, N.A. v. Air Capitol Aircraft Sales, Inc., 820 F.2d 1127, 1133 (10th Cir. 1987). Because plaintiff did not file her motion to amend until one year after the district court had dismissed all of her claims, the district court did not err in denying the motion. See, e.g., Woolsey, 934 F.2d at

1462; Las Vegas Ice & Cold Storage Co., 893 F.2d at 1185; First City Bank, 820 F.2d at 1132-33; A. E. v. Mitchell, 724 F.2d 864, 868-69 (10th Cir. 1983).

The judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED.

Entered for the Court

Oliver Seth
Circuit Judge

(Note: This Order and Judgment was entered on December 8, 1992).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BARBARA MARTIN ELLIOTT,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 89-C-1005-B
	)	
FAE A. MORELAND, individually and as a County Clerk of Washington County, Oklahoma,	)	
	)	
Defendant.	)	

ORDER OVERRULING MOTION FOR
LEAVE TO AMEND COMPLAINT

Plaintiff's Motion for Leave to Amend Complaint filed June 6, 1991 is before the Court for decision. Said Motion for Leave to File Amended Complaint is DENIED for the following reasons:

Plaintiff filed her Complaint on December 4, 1989. The Defendant filed a Motion to Dismiss and brief in support on January 10, 1990. The Plaintiff filed no timely response. The case came on for

status conference scheduling on March 28, 1990 at 3:50 P.M. after proper notice. Two counsel for the defendant appeared, one from Oklahoma City and one from Bartlesville, Oklahoma. Plaintiff's attorney failed to appear and by March 28, 1990 had not responded to Defendant's Motion to Dismiss. By Order dated and entered March 30, 1990, Plaintiff was ordered to respond to Defendant's Motion to Dismiss by April 2, 1990. Plaintiff again failed to respond. On May 18, 1990, the Defendant filed a motion and brief requesting the Court to determine that the Plaintiff had waived her objection to the Motion to Dismiss. Plaintiff still persisted in filing no response and on June 6, 1990, the Court entered its Order dismissing the federal claim set forth in Counts 1 and 3 of the Plaintiff's Complaint with prejudice pursuant to

Fed.R.Civ.P. 41(b), and dismissing the state pendent claims, Counts 2 and 4 without prejudice.

Plaintiff filed no timely motion for new trial, motion to reconsider, motion to amend, or notice of appeal. One entire year after the Court's dismissal of June 6, 1990, the Plaintiff, on June 6, 1991, filed her Motion for Leave to Amend Complaint.

As Plaintiff has set forth no valid reason for the undue delay, Plaintiff's Motion to Amend is untimely pursuant to Fed.R.Civ.P. 15(a). Undue delay is a valid reason for refusal to grant leave to amend. *See*, Triplett v. LeFlore County, Okl., 712 F.2d 444 (10th Cir. 1983), First City Bank v. Air Capitol Aircraft Sales, 820 F.2d 1127, 1132 (10th Cir. 1987); Las Vegas Ice and Cold Storage Co. v. Far West Bank, 893 F.2d 1182, 1185 (10th Cir.

1990); Koch v. Koch Industries, Inc., 127 F.R.D. 206 (D. Kan. 1989); Murphy v. Klein Tools, Inc., 693 F.Supp. 982, 988-89 (D.Kan. 1988); and C. Wright, A. Miller, and R. Kane, Federal Practice & Procedure, § 1488 at 659 (1990).

Had this action not already been dismissed, the Court would be justified in dismissing same for failure to prosecute under Fed.R.Civ.P. 41(b). *See*, C. Wright and A. Miller, Federal Practice & Procedure, § 2369, at 191 and 195 (1987).

Plaintiff's Motion for Leave to Amend Complaint is hereby DENIED and the Court's Order of dismissal as set forth in the Court's Order filed June 6, 1990 remains the law of the case.

Dated this 5th day of December, 1991.

s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

(Note: This Order was entered on the docket of the District Court Clerk on December 5, 1991).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BARBARA MARTIN ELLIOTT, Plaintiff,	)	
vs.	)	Case No. 89-C-1005-B
FAE A. MORELAND, individually and as County Clerk of Washington County, Oklahoma, Defendant.	)	

ORDER

This matter comes on for consideration upon the Motion to Dismiss filed by Defendant, Fae A. Moreland, individually and as County Clerk of Washington County, Oklahoma. Defendant's Motion was filed January 10, 1990. Plaintiff's response was due January 25, 1990, none being filed. On February 26 the case was set for status/scheduling conference for March 28, 1990. Plaintiff failed to appear at the conference. By

Order dated and entered March 30, Plaintiff was ordered to respond to Defendant's Motion to Dismiss by April 2, 1990. No response has been filed.

Plaintiff brought this action under 42 U.S.C. §1983 seeking actual and punitive damages in the total amount of $1,000,000.00 for alleged deprivation of various First Amendment[1] rights, secured to Plaintiff by virtue of the Fourteenth Amendment. Particularly, Plaintiff complains she has been denied her rights of freedoms of speech, assembly and association as a result of alleged discrimination against her because of a physical handicap, a hearing impairment.

The Court is hampered by the failure of Plaintiff, through her counsel, to respond to Defendant's Motion to Dismiss.

---

[1] To the Constitution of the United States.

As the matter stands, Plaintiff's failure to comply with Rule 15(A), Local Rules of the District Court for the Northern District of Oklahoma constitutes a waiver of objection by Plaintiff to Defendant's Motion and further constitutes a confession of the matters raised by such pleadings.

Plaintiff's counsel's indifference notwithstanding, the Court is vitally concerned with a litigant's real right to pursue an alleged grievance. Plaintiff complains she was denied use of an audio-amplifier on her work telephone although provided by her personally. She claims denial of promotion because of her hearing impairment. She makes other claims of negative treatment by the Defendant as a result of her physical impairment, assumed for the purposes of the Motion to Dismiss to be true. Lastly, she claims

retaliation for filing a grievance, in 1986, with the Oklahoma Human Rights Commission, which retaliation took the form of additional duties and assignments of demeaning office jobs. The Complaint states the OHRC issued a determination that there was reasonable cause to believe that Defendant engaged in a discriminatory act as alleged by the Plaintiff but an explanation of what the discriminatory act consisted of has not been provided to the Court.

42 U.S.C. §1983 "creates no substantive rights; it merely provides remedies for deprivation of rights established elsewhere." City of Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). It is unclear to the Court how refusing to allow a hearing impaired employee use of audio-amplifier on her work telephone fits

within the parameters of First Amendment guarantees. Again, Plaintiff, through her counsel, fails to assist the Court in this query. The Court fails to see any nexus between the alleged handicap discrimination and the rights to exercise freedom of speech, freedom of assembly and freedom of association under the First Amendment.

To dismiss a complaint and action for failure to state a claim upon which relief can be granted it must appear beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957). Motions to dismiss under Rule 12(b), Fed.R.Civ.P. admit all well-pleaded facts. Jones v. Hopper, 410 F.2d 1323 (10th Cir.1969), *cert. denied,* 397 U.S. 991 (1970). The allegations of the Complaint must be taken as true and

all reasonable inferences from them must be indulged in favor or complainant. Olpin v. Ideal National Ins. Co., 419 F.2d 1250 (10th Cir. 1969), *cert. denied*, 397 U.S. 1074 (1970).

The Court concludes, as to Count One, Plaintiff has failed to state a claim upon which relief can be granted. Plaintiff's Count One should be and the same is hereby DISMISSED.

Plaintiff's Third Count alleges employment discharge without a pretermination hearing and other due process protections. Plaintiff fails to allege the existence of a property interest and therefore the claim fails. In order to invoke the protections of the fourteenth amendment, it must first be established that a protected property interest is at stake. Graham v. City of Oklahoma City, 859 F.2d 142 (10th Cir-

1988); Richardson v. City of Albuquerque, 857 F.2d 727 (10th Cir-1988). Under Oklahoma law, a deputy county clerk has no property interest. 19 O.S.A. §242; Starrett v. Wadley, 876 F.2d 808 (10th Cir-1988). The Court concludes Plaintiff's Third Count should be and the same is hereby DISMISSED.

Plaintiff's Second and Fourth Counts are pendent state claims subject to retention or dismissal within the Court's discretion. The Court believes the better course of action, in view of the disposition of Counts One and Three, is to dismiss these counts. Therefore, the Court directs that Plaintiff's Second and Fourth Counts should be and the same are hereby DISMISSED WITHOUT PREJUDICE.

IT IS SO ORDERED this 6th day of June, 1990.

s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

(Note: This Order was entered on the docket of the District Court Clerk on June 7, 1990.)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BARBARA MARTIN ELLIOTT, Plaintiff,	)	
vs.	)	Case No. 89-C-1005-B
FAE A. MORELAND, individually and as County Clerk of Washington County, Oklahoma Defendant.	)	Attorney's Lien Claimed

COMPLAINT

Comes now the plaintiff and for her cause of action against the defendant, alleges and states:

JURISDICTION

1. Plaintiff brings this action to redress violations by defendant of plaintiff's rights under the Constitution and laws of the United States and the State of Oklahoma.

2. This is an action pursuant to 42 U.S.C. §1983 to redress deprivation under

color of statute, ordinance, regulation, custom or usage of rights, privileges and immunities secured to plaintiff by the Fourteenth Amendment to the Constitution of the United States, namely, the right to exercise freedom of speech, freedom of assembly and freedom of association under the First Amendment to the Constitution of the United States.

3. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331 and 1343(3), which confer original jurisdiction on Federal District Courts in suits to redress the deprivation of rights, privileges and immunities.

4. At all times relevant to this complaint, defendant acted under color and pretense of law, to-wit: under color of the statutes, ordinances, regulations, customs and usages of the State of Oklahoma and the County of Washington.

5. At all times relevant to this complaint, defendant engaged in the illegal conduct herein mentioned to the injury of plaintiff, and deprived plaintiff of her rights, privileges and immunities secured to her by the Fourteenth Amendment to the Constitution of the United States and the laws of the United States and the State of Oklahoma.

PARTIES

6. Plaintiff, Barbara M. Elliott, was a citizen of the United States and of the State of Oklahoma and of the County of Washington, she is now residing in Dickson, Tennessee at all times relevant to this complaint.

7. Plaintiff, Barbara M. Elliott, prior to the actions complained of herein, was employed as a Deputy Clerk/Secretary for the Washington County Clerk's Office from December 1, 1971, until December 31,

1987.

8. Plaintiff is a handicapped person by reason of her hearing impairment.

9. Defendant, Fae A. Moreland, is and was at all times relevant to this complaint the duly elected County Clerk of Washington County, Oklahoma.

FACTS

10. On October 27, 1986, plaintiff filed a formal administrative grievance with the Oklahoma Human Rights Commission who issued a determination that there was reasonable cause to believe that defendant engaged in a discriminatory act as alleged by the plaintiff.

FIRST COUNT

11. Plaintiff was denied reasonable accommodation for her hearing impairment by being denied use of an audio-amplifier on the telephone she used and by being

denied to use an amplifier which she herself provided.

12. Plaintiff was denied promotion to a position of purchasing agent because of her hearing impairment and lack of the use of an amplifier.

13. Defendant made derogatory remarks about plaintiff's hearing impairment and discounted and ignored her acquired and natural abilities as a secretary in spite of her years of service to Washington County and the County Clerk's office. Plaintiff was ridiculed, berated and badgered by the defendant because of her hearing impairment.

SECOND COUNT

14. As a direct and proximate result of defendant's actions, plaintiff has been deprived of her rights under state statutes and regulations for the protection of the physically handicapped

and suffered embarrassment, emotional and mental distress.

15. In retaliation for filing her complaint with the Oklahoma Human Rights Commission, defendant gave plaintiff additional duties and assignments to increase her work load and required to take demeaning office jobs which slowly destroyed her health due to exhaustion, frustration and depression.

16. Plaintiff was not permitted to learn any other job for advancement, although she was qualified and more experienced than others in the same work category.

17. Due to the work related stress, plaintiff was forced to seek medical attention for depression and anxiety.

18. Due to the anxiety and stress related experiences of discrimination the on-going retaliation, and eventual

termination, the period of unemployment and searching for a new job, plaintiff developed an ulcer in her stomach which caused internal bleeding and she was forced to seek medical care and was hospitalized.

THIRD COUNT

19. Plaintiff was discharged without being given opportunity for a pretermination hearing; an opportunity to confront her accusers; opportunity to express her position; opportunity to have an impartial tribunal; and was otherwise deprived of due process.

FOURTH COUNT

20. Plaintiff's discharge from her employment was contrary to the public policy of the State of Oklahoma as expressed under 25 O.S. § 1101 et seq. providing protection for handicapped persons from employment discrimination.

21. Plaintiff was terminated because of her hearing impairment and while on medical leave and termination under those circumstances constitutes (sic) the public policy of the State of Oklahoma.

WHEREFORE, plaintiff prays judgment against defendant for reinstatement to her former position; for actual damages in the sum of $500,000.00; and for punitive damages in the sum of $500,000.00; attorney's fees; and the cost of this action and such other relief as may be proper.

s/ Earl W. Wolfe
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Attorney for the Plaintiff
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(918) 582-3168

(Note: This Complaint was filed in the District Court Clerk's office on December 4, 1989).

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BARBARA MARTIN ELLIOTT, Plaintiff,	)	
vs.	)	Case No. 89-C-1005-B
FAE A. MORELAND, individually and as County Clerk of Washington County, Oklahoma, Defendant.	)	

MOTION FOR LEAVE TO AMEND COMPLAINT

Comes now the plaintiff and moves this Court for leave to amend her complaint, originally filed on December 4, 1989, pursuant to F.R.C.P. Rule 15(a).

A copy of plaintiff's proposed Amended Complaint is attached hereto, together with Plaintiff's Brief in Support of Motion for Leave to Amend. Defendant objects.

EARL W. WOLFE & ASSOCIATES

s/ Earl W. Wolfe
Earl W. Wolfe
123 Hartford Building
110 South Hartford
Tulsa, Oklahoma 74120-1834
(918) 582-3168

CERTIFICATE OF MAILING

I hereby certify that on the 6 day of June, 1991, a true and correct copy of the above and foregoing Motion for Leave to Amend Complaint was mailed, proper postage prepaid, to David W. Lee, Two Leadership Square, 211 North Robinson, Suite 1300, Oklahoma City, Oklahoma 74102-7114 (sic).

s/ Earl W. Wolfe

(Note: This motion was filed in the District Court Clerk's office on June 6, 1991).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BARBARA MARTIN ELLIOTT, Plaintiff,	)	
vs.	)	Case No. 89-C-1005-B
FAE A. MORELAND, individually and as County Clerk of Washington County, Oklahoma, Defendant.	)	

PLAINTIFF'S BRIEF IN SUPPORT OF
PLAINTIFF'S MOTION FOR LEAVE TO AMEND

Comes now the plaintiff and represents to this Court that the following Facts and Authority support Plaintiff's Motion for Leave to Amend Complaint.

FACTS

1. Plaintiff's original complaint herein was filed in the United States District Court for the Northern District of Oklahoma on December 4, 1989, by the undersigned Earl W. Wolfe, attorney for

the plaintiff. Plaintiff's Complaint was properly filed in conformity with all applicable statutes and local rules of the United States District Court for the Northern District of Oklahoma in effect at that time. Service of the complaint and summons herein was properly made upon the defendant shortly thereafter.

2. On the 21st day of December, 1989, the defendant, acting by and through her attorney of record, Louis (sic) B. Ambler, mailed an Entry of Appearance and Application for Extension of Time in Which to Respond to the Plaintiff's Complaint in said matter.

3. On December 22, 1989, an Order was entered in the United States District Court for the Northern District of the State of Oklahoma granting Defendant's Application for Extension of Time. Said Order granted defendant until the 11th day

of January, 1990, within which to file her answer, or motion, addressed to the Plaintiff's Complaint, in said cause.

4. On the 9th day of January, 1990, attorney David W. Lee, entered his appearance as counsel in said case for the defendant, Fae A. Moreland, individually and as County Clerk of Washington County, Oklahoma.

5. On February 26, 1990, the case herein was set for a Status/Scheduling Conference on March 28, 1990. The plaintiff failed to appear at said Status/Scheduling Conference by reason of an extreme workload and conflicting court schedules of solo practitioner, Earl W. Wolfe attorney for the plaintiff. Subsequent to said conference, this Court entered an Order dated March 30, 1990, ordering the plaintiff to respond to the Defendant's Motion to Dismiss by April 2,

1990. Again, by reason the plaintiff's attorney, Earl W. Wolfe's heavy workload and conflicting trial schedule no response was filed.

6. On the 6th day of June, 1990, this Honorable Court made and entered an Order dismissing each of the four counts of the plaintiff's complaint herein.

7. No answer by the defendant, Fae A. Moreland, either individually or as County Clerk of Washington County, Oklahoma, was ever filed in the instant case, either before or after this Court's Order dismissing said case.

ARGUMENT & AUTHORITIES

I.

Plaintiff would submit to this Honorable Court that she is entitled to now amend her petition herein as a matter of course. Plaintiff finds support for this position in Rule 15(a) of the Federal

Rules of Civil Procedure, which states in pertinent part,

> "(a) party may amend the parties' pleadings once as a matter of course at any time before a responsive pleading is served . . . (o)therwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

It is undisputed that no responsive pleading, as such, was ever filed herein. Moreover, a Motion to Dismiss is not ordinarily deemed a responsive pleading. Glenn v. First National Bank in Grand Junction, 868 F.2d 368, 370 (CA. 10 1989). We note, however that, "(a) Motion to Dismiss is treated like a responsive pleading when final judgment is entered before plaintiff files an amended complaint." Cooper v. Shumway, 780 P.2d (sic) 27, 29 (CA. 10 1985). A crucial question then with regard to whether the

plaintiff herein may amend either as a matter of course or by leave of the Court without seeking to set aside previous judgment, is whether or not the Court's previous order dismissing the Plaintiff's complaint herein was a final judgment. It is clear that if the Court's Order dismissing the Plaintiff's Original Complaint herein was a final judgment, the plaintiff is precluded from amending her complaint as of right pursuant to Rule 15(a). Id. at p. 29.

It has been held in this jurisdiction that,

> "(i)n order to determine whether a trial court's dismissal of a complaint is a final appealable order, we must scrutinize the order to determine whether the trial court intended to dispose of the plaintiff's entire cause of action." Sooner Products Co. v. McBride, 708 F.2d 510, 511 (10th Cir. 1983).

A review of this Court's Order dismissing

Plaintiff's Complaint on June 6, 1990, (a copy of which is appended hereto as Exhibit A) reveals that said Order is not a final, appealable order dismissing the plaintiff's entire cause of action. The referenced Order expressly directed that plaintiff's second and fourth counts, counts based upon pendent State Claims, were to be dismissed without prejudice. A dismissal without prejudice is clearly intended to provide the plaintiff with an opportunity to reassert her causes of action without resort to an appeal. In addition, this Court stated with regard to count one of the Plaintiff's Original Complaint, that it was, " . . . vitally concerned with a litigant's real right to pursue an alleged grievance." The Court then noted numerous claims by the plaintiff of negative treatment at the hands of the defendant which the Court,

for purposes of the Defendant's Motion to Dismiss, assumed to be true. The Court also noted that the Plaintiff's Original Complaint had alleged that the Oklahoma Human Rights Commission had found reasonable cause to believe that the defendant engaged in discriminatory acts towards the plaintiff. This Court then observed, with regard to its finding that the plaintiff had failed to state a claim upon which relief could be granted in the first count of her original cause of action, that an explanation of the discriminatory acts towards the plaintiff had not been provided the Court. This Court also noted, in support of its Order dismissing the Plaintiff's Complaint, that there appeared to be no nexus between the alleged handicap discrimination and the rights to exercise Freedom of Speech, Freedom of Assembly and Freedom of

Association under the First Amendment as presented by the plaintiff and concluded that a claim based upon such a nexus was fatally defective.

Based upon the foregoing, the plaintiff would submit that this Court did not intend to dispose of the plaintiff's entire cause of action with its Order dismissing Plaintiff's Original Complaint on June 6, 1990. Two of the plaintiff's causes of action in her Original Complaint were, as we have noted, expressly dismissed without prejudice. Another cause of action, denominated First count of Plaintiff's original Complaint, was, at least impliedly, found to have some merit notwithstanding that said cause of action was not well pleaded. In view of the fact that this Court did not intend to dispose of the plaintiff's entire cause of action, the plaintiff's Complaint should, under

Federal Rules of Civil Procedure 15 (a), be susceptible of amendment either as a matter of course or by leave of the Court.

Plaintiff would reiterate her argument that, based upon that portion of Federal Rules of Civil Procedure 15 (a) cited above, this Court should permit plaintiff to amend her Complaint as a matter of course. In the event that this Court finds that the plaintiff is not entitled to amend her Complaint as a matter of course, plaintiff would submit that this Court should grant leave to the plaintiff to amend her pleading, upon the principle that,

> "'(i)n dismissing a complaint for failure to state a claim, the Court should grant leave to amend freely 'if it appears at all possible that the plaintiff can correct the defect.' 3 Moore's Federal Practice, ¶15.10 & n.2 (1983)."

Quoted with favor in Triplett v. LeFlore

County, Oklahoma, 712 F.2d 444, 446 (10th Cir. 1983).

Plaintiff acknowledges that the first count of her original Complaint was, in fact, defective in the particulars remarked upon by this Court. Plaintiff would, however, submit that her Amended Complaint cures said defects. First, the plaintiff in her Amended Complaint alleges the proper elements of a handicap discrimination claim under the appropriate federal statutes without reference to First Amendment Rights. Secondly, plaintiff's Amended Complaint properly frames her claim with regard to First Amendment Rights by referring to violation of her First Amendment Rights in a separate count. That count alleges retaliation taken against her by the defendant after the plaintiff exercised her First Amendment Rights. The plaintiff

would submit to this Court that her Amended Complaint properly frames the issues herein and cures any defects in the form of the pleadings mentioned.

With regard to the plaintiff's third count in her original Complaint, plaintiff acknowledges that it cannot be shown at this time that a protected property interest was at stake when she was wrongfully discharged as Deputy County Clerk of Washington County, Oklahoma. Therefore, plaintiff has deleted any reference to such a cause of action from her Amended Complaint.

A second principle which has application in the instant case is that,

> "(i)n the absence of an apparent reason to refuse leave to amend - such as undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, futility of an amendment, et seq. - 'the leave sought

> should, as the rules require, be freely given'." [Quoting with favor Foman v. Davis, 83 S.Ct. 227, 230 (1962) and 3 Moore's Federal Practice, ¶15.08 (1983)].

Triplett v. LeFlore County, Oklahoma, 712 F.2d 444, 446 (10th Cir. 1975 [sic]). There appears, in the present case, no apparent reason to refuse leave to amend. Leave to amend will not cause undue prejudice to accrue to the opposing party, an amendment will not be futile as we have demonstrated above, and undue delay, bad faith or dilatory motives are absent.

This interpretation of the rule is clearly applicable in the instant case, where no previous amended complaint has been made and where the defendant has not served a responsive pleading as defined in Fed.R.Civ.P. 7(a) to plaintiff's original complaint in the form of an answer.

CONCLUSION

Plaintiff respectfully submits to this Court that the Court's Order dismissing plaintiff's original Complaint herein is not a final appealable order. Leave to Amend the complaint herein, if required, will not operate to further any improper motive on the part of the plaintiff or to work undue prejudice or hardship upon the defendant and that therefore leave to amend should be freely granted.

Respectfully submitted,

EARL W. WOLFE & ASSOCIATES

s/ Earl W. Wolfe

Earl W. Wolfe
123 Hartford Building
110 South Hartford
Tulsa, Oklahoma 74120-1834
(918) 582-3168

CERTIFICATE OF MAILING

I hereby certify that on this 6 day of June, 1991, a true and correct copy of the above and foregoing Plaintiff's Brief in Support of Plaintiff's Motion for Leave

to Amend was deposited in the U. S. Mail, having proper postage thereon to David W. Lee, MCKENZIE, SYKORA & LEE, Two Leadership Square, 211 North Robinson, Suite 1300, Oklahoma City, Oklahoma 74102-7114.

s/ Earl W. Wolfe

(Note: This brief was filed in the District Court Clerk's office on June 6, 1991, and was accompanied by the proposed Amended Complaint which immediately follows).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BARBARA MARTIN ELLIOTT, Plaintiff,	)	
vs.	)	Case No. 89-C-1005-B
FAE A. MORELAND, individually and as County Clerk of Washington County, Oklahoma, Defendant.	)	Attorney's Lien Claimed

AMENDED COMPLAINT

Comes now the plaintiff and for her amended causes of action against the defendant, alleges and states:

JURISDICTION

1. Plaintiff brings this action to redress violations by defendant of plaintiff's rights under the Constitution and laws of the United States and the State of Oklahoma.

2. This is an action pursuant to 29 U.S.C. §794 to redress discrimination against the plaintiff, by reason of her

handicap, under a program or activity receiving Federal financial assistance.

3. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331 and 1343(3), which confer original jurisdiction on Federal District Courts in suits to redress the deprivation of rights, privileges and immunities.

4. At all times relevant to this complaint, defendant acted under color and pretense of law, to-wit: under color or the statutes; ordinances, regulations, customs and usages of the State of Oklahoma and the County of Washington.

5. At all times relevant to this complaint, defendant engaged in the illegal conduct herein mentioned to the injury of plaintiff, and deprived plaintiff of her rights, privileges and immunities secured to her by the Fourteenth Amendment to the Constitution

of the United States and laws of the United States and the State of Oklahoma.

PARTIES

6. Plaintiff, Barbara M. Elliott, was a citizen of the United States and of the State of Oklahoma and of the County of Washington, at all times relevant to this complaint. She currently resides in Dickson, Tennessee.

7. Plaintiff, Barbara M. Elliott, prior to the actions complained of herein, was employed as a Deputy Clerk/Secretary for the Washington County Clerk's Office from December 1, 1981, to December 31, 1987.

8. Plaintiff is an otherwise qualified person who is a handicapped individual by reason of her hearing impairment which substantially limits one or more of her major life activities. Plaintiff has a record of such impairment

and is regarded as having such an impairment.

9. Defendant, Fae A. Moreland, is and was at all times relevant to this complaint the duly elected County Clerk of Washington County, Oklahoma.

FACTS

10. Plaintiff was employed as a Deputy in the office of the County Clerk of Washington County on December 2, 1981. Said employment entailed dealing with the public and with other county offices on a regular basis. Said dealings with both public and with other county offices were frequently conducted by telephone. Plaintiff, by reason of her hearing impairment, was often unable to communicate with other persons by telephone without the aid of amplifier/booster equipment for said phone. Such equipment is readily

available at a reasonable cost.

11. Numerous requests were made by the plaintiff to the defendant to have an amplifier/booster device attached to the plaintiff's telephone in order that she might more efficiently and accurately perform her duties. Defendant repeatedly refused or neglected to provide such equipment and the plaintiff eventually provided an amplifying device for her telephone set at her own expense. Defendant subsequently demanded that plaintiff remove said amplifying device from her telephone set and again refused to furnish one such a device at county expense. Plaintiff then repeatedly offered to provide an amplifying device for plaintiff's telephone which would meet defendant's approval at the plaintiff's own expense. Defendant declined such offer and continued to neglect or refuse

to provide an amplifying device for the plaintiff's telephone at county expense.

12. Plaintiff was systematically denied an opportunity to train for positions within the County Clerk's office which would have afforded her either promotions or an opportunity for more liberal salary increases. Defendant justified her denial of advancement opportunity to the plaintiff on the basis that the plaintiff was unable to handle telephone communication necessary for increased responsibility within the office, notwithstanding the fact that it was the defendant who systematically denied the plaintiff an opportunity to use amplifier/booster devices and thereby be provided with the means to handle the telephone communications demanded.

13. Defendant systematically and regularly harassed the plaintiff by

leaving her alone in the office to answer the telephones. Because the telephones in said office were not equipped with an amplifier/booster device which would have enable the plaintiff to hear properly, the plaintiff suffered extreme embarrassment and humiliation by being forced to ask telephone callers to raise their voices or to shout to her over the telephone, by being unable to accurately obtain messages over the telephone and by being forced to seek out other persons to take telephone messages and write them down for her.

14. Defendant made derogatory remarks about plaintiff's hearing impairment and discounted and ignored her acquired and natural abilities as a secretary in spite of her years of service to Washington County in the County Clerk's office. Plaintiff was ridiculed, berated and badgered by the defendant because of

her hearing impairment.

15. Plaintiff was denied promotion to a position of purchasing agent because of her hearing impairment and lack of the use of an amplifier.

16. On October 27, 1986, the plaintiff, unable to obtain a resolution to this situation by discussing it with the defendant, filed a formal administrative grievance with the Oklahoma Human Rights Commission who issued a determination that there was a reasonable cause to believe that the defendant engaged in a discriminatory act as alleged by the plaintiff.

17. On December 4, 1987, plaintiff was served by mail with written notice that her employment in the Washington County Clerk's office would terminate December 31, 1987. Acting upon information, plaintiff now believes that

said discharge was in retaliation for filing the Oklahoma Human Rights Commission Complaint.

FIRST COUNT

18. The plaintiff was well-qualified for the position which she held with the Washington County Clerk's office and was well-qualified for promotion within said office.

19. The plaintiff was unable to meet the rigorous and unreasonable job demands placed upon her by the defendant's supervisor solely because she was denied use of an audio-amplifier on the telephone which she used, even though the plaintiff attempted to provide such a device at her own expense.

20. Defendant has denied reasonable accommodation to the plaintiff for her hearing impairment by denying her the use of an audio-amplifier device on her

telephone, whether provided by the defendant or provided by the plaintiff.

21. As a result of the defendant's discriminatory acts, plaintiff was injured by suffering embarrassment, humiliation, undue job related stress and loss of promotional opportunities and, ultimately, loss of employment, all due to the defendant's unreasonable refusal to make reasonable accommodation for the plaintiff's hearing impairment.

SECOND COUNT

22. Defendant's wrongful acts towards the plaintiff, culminating in the wrongful discharge of the plaintiff for disclosing the defendant's discriminatory acts to the Oklahoma Human Rights Commission, constitute an infringement upon certain constitutional rights and freedoms guaranteed the plaintiff by the First Amendment of the Constitution of the

United States through the Fourteenth Amendment.

23. As a result of the retaliatory discharge of the plaintiff by the defendant, plaintiff's rights of free speech and rights of association were unconstitutionally abridged and infringed upon. Specifically, plaintiff was unconstitutionally "punished" for communicating with the Oklahoma Human Rights Commission when, in fact, she had ever right to do so, both under the Constitution of the United States and under the statutes of the State of Oklahoma.

THIRD COUNT

24. Plaintiff's discharge from her employment was contrary to the public policy of the State of Oklahoma as expressed under 25 O.S. §1101, et seq., which provides protection for handicapped

persons from employment discrimination.

25. Plaintiff was terminated because of her hearing impairment and terminated while on medical leave. Termination under those circumstances constitute a violation of the public policy of the State of Oklahoma as set forth in 25 O.S. §1101.

FOURTH COUNT

26. Plaintiff was terminated because she sought to address certain grievances against her employers through the offices of the Oklahoma Human Rights Commission, said State Agency being provided for that purpose, and plaintiff's retaliatory discharge for seeking redress for grievances through said commission is in violation of the public policy of the State of Oklahoma.

WHEREFORE, plaintiff prays judgment against defendant for reinstatement to her former position; for back pay and

benefits; for actual damages in the sum of $500,000.; for punitive damages in the sum of $500,000.; attorney's fees and the costs of this action such other relief as may be proper.

EARL W. WOLFE & ASSOCIATES

By s/ Earl W. Wolfe
Earl W. Wolfe
123 Hartford Building
110 South Hartford
Tulsa, Oklahoma 74120-1834
(918) 582-3168

CERTIFICATE OF MAILING

I hereby certify that on this 6 day of June, 1991, a true and correct copy of the above and foregoing Amended Complaint was deposited in the U. S. Mail, having proper postage thereon to the following attorney:

David W. Lee
MCKENZIE, SYKORA & LEE
Two Leadership Square
211 North Robinson, Suite 1300
Oklahoma City, OK 73102-7114

s/ Earl W. Wolfe

APPENDIX F

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
***

28 U.S.C. § 1291. Final decisions of district courts.

The courts of appeal (other than the United States Court of appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1331. Federal question.

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343. Civil rights and elective franchise.

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

* * *

29 U.S.C. § 794. Nondiscrimination under federal grants and programs; promulgation of rules and regulations

(a) Promulgation of rules and regulations

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive Agency . . .

* * *

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

FEDERAL RULES OF CIVIL PROCEDURE:

RULE 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

***

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted, * * *

RULE 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

No. 92-1469

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

BARBARA MARTIN ELLIOTT,

Petitioner

v.

FAE A. MORELAND, INDIVIDUALLY AND AS COUNTY CLERK OF WASHINGTON COUNTY, OKLAHOMA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

David W. Lee
David W. Lee, P.C.
818 N.W. 63rd Street
Suite 100
Oklahoma City, OK 73116

Attorney for Respondent

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court abused its discretion when it denied the Petitioner's Motion for Leave to File an Amended Complaint.

2. Whether the district court abused its discretion when it held, on alternative grounds, that the Petitioner's Complaint should have been dismissed under Fed. R. Civ. P. 41(b) for failure to prosecute.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

BARBARA MARTIN ELLIOTT, Petitioner,	)	
vs.	)	Case No. 92-1469
FAE A. MORELAND, Respondent.	)	

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Petitioner ("Elliott") was an employee of the Washington County, Oklahoma, County Clerk's Office until her discharge by the Respondent, ("Moreland"), the County Clerk, on December 31, 1987. In her complaint, Elliott contended that certain acts of Moreland, including her discharge of Elliott, violated Elliott's rights under the First and Fourteenth Amendments to the United

States Constitution.[1] The Complaint, which was an action brought pursuant to 42 U.S.C. § 1983, was filed on December 4, 1989, the same month the two year statute of limitations would have run. See Abbitt v. Franklin, 731 F.2d 661 (10th Cir. 1984) (en banc) (under Oklahoma law, two year statute of limitations applies for civil rights actions).

On January 10, 1990, Moreland filed a motion and brief to dismiss the complaint. Elliott filed no response, despite the fact that one is required by the local court rules to be filed within fifteen days of the original motion. U.S. Dist. Ct. Rules, N.D. Okla. Rule 15(A).

---

[1]In her original complaint, Elliott's allegations under federal law were that her First Amendment rights had been violated by discrimination against her on the basis of her handicap, and that her property interests under the Fourteenth Amendment had been violated. Elliott also alleged violations of state tort law in two counts of the complaint.

The case was then set for status/scheduling conference on March 28, 1990, at 3:50 p.m. in Tulsa, Oklahoma. The attorney for Moreland drove from Oklahoma City, and his co-counsel drove from Bartlesville for this conference. Elliott's attorney failed to appear at the conference. At the time of the conference, Elliott still had not responded to Moreland's Motion to Dismiss, which was filed over two months before the hearing.

After Elliott's nonappearance at the status conference, the district court specifically ordered her to respond to Moreland's Motion to Dismiss, ordered discovery to be completed by June 29, 1990, and set the case for another status conference on July 2, 1990, at 1:15 p.m.

Elliott still did not respond to Moreland's Motion to Dismiss. Finally, on May

18, 1990, Moreland filed a motion and brief requesting the district court to determine that Elliott had waived her objection to the Motion to Dismiss, or, in the alternative, for an order staying discovery until the Motion to Dismiss had been ruled on. Elliott did not respond to this motion, and still failed to respond to the original motion to dismiss. On June 6, 1990, the district court entered its order dismissing the case.

On June 6, 1991, one full calendar year after the case was dismissed, Elliott filed a motion and brief for leave to file an amended complaint.[2] The proposed amended complaint set forth a new set of theories under federal

---

[2]This would have been on the last day before the statute of limitations would have run, since Oklahoma's savings clause gave Elliott an additional year after the dismissal to file an amended complaint. See Okla. Stat. Ann. tit. 12, § 100 (West 1988); Brown v. Hartshorne Public School District No. 1, 926 F.2d 959, 961 (10th Cir. 1991).

law as to why she was entitled to relief. For the first time, Elliott contended that her rights under the Rehabilitation Act, 29 U.S.C. § 794, had been violated. She also claimed that her First Amendment rights had been violated because she had been discharged for disclosing Moreland's discriminatory acts to the Oklahoma Human Rights Commission. In her Brief in Support of Motion for Leave to Amend, Elliott essentially conceded that her original contentions regarding First and Fourteenth Amendment violations were meritless, and did not reassert these claims. Elliott offered no explanation as to why the Rehabilitation Act claims were not presented in the original complaint.

Moreland opposed the filing of the proposed Amended Complaint on the ground that such had not been timely pursued. On December 5, 1991, the district court, citing the

actions of Elliott noted above, entered its order denying Elliott's Motion for Leave to File the Amended Complaint, and noted that it also would have dismissed the action pursuant to Fed. R. Civ. P. 41(b) for failure to prosecute.

Elliott appealed the dismissal, and on December 8, 1992, the United States Court of Appeals for the Tenth Circuit, in an unpublished order and judgment, affirmed the district court's dismissal.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

THERE WAS NO ABUSE OF DISCRETION BY THE DISTRICT COURT WHEN IT REFUSED TO ALLOW ELLIOTT TO FILE THE AMENDED COMPLAINT, BECAUSE ELLIOTT HAS OFFERED NO EXPLANATION FOR THE EXCESSIVE DELAY IN REQUESTING LEAVE TO FILE THE AMENDED COMPLAINT; FURTHERMORE THE TENTH CIRCUIT'S RULING IS CONSISTENT WITH THAT OF OTHER COURTS OF APPEAL.

In the present case, the district court denied Elliott's Motion for Leave to File an Amended Complaint, which was filed on July 6,

1991, an entire calendar year after the court had previously dismissed her Complaint on June 6, 1990.[3] The history of this case was one of refusal to comply with the district court's orders, and abuse of the legal system and of Moreland. In its two orders, the district court outlined the relevant facts constituting the abuse.

Elliott claims that the district court erred by dismissing the federal claims involving counts one and three of the complaint with prejudice in its June 6, 1990, order. However, the order states only that counts one and three were dismissed; the court dismissed counts 2 and 4 without prejudice.

---

[3]As noted previously, the motion for leave to amend was filed on the last day before the statute of limitations was to run, with Elliott apparently relying on the one year savings clause in Okla. Stat. Ann. tit. 12, § 100 (West 1988). See Brown v. Hartshorne Public School District No. 1, 926 F.2d 959, 961 (10th Cir. 1991).

Therefore, Elliott was free at any time to ask for leave of court to add the new claims she eventually added to her proposed Amended Complaint.

Furthermore, for the reasons pointed out in the district court's order, the claims in counts one and three of the original Complaint were essentially frivolous; one was based on alleged violation of freedom of speech under the First Amendment because of discrimination based on Elliott's handicap, and the other was for an alleged violation of her property interest under the Fourteenth Amendment, a claim made without any factual allegations. Significantly, Elliott does not claim in this appeal that the district court erred by dismissing the Complaint with regard to the substance of those two counts, nor does she ask this court to allow her to amend her Complaint to clarify these issues in an

Amended Complaint.

Therefore, the issue is whether the district court erred in refusing leave to amend after the one year passage of time, and after the repeated failure of Elliott to comply with court orders or local rules. In First City Bank v. Air Capitol Aircraft Sales, 820 F.2d 1127, 1132 (10th Cir. 1987), the court stated that there is no abuse of discretion to refuse to permit leave to amend if the district court relies on a reason such as undue delay, bad faith, or a dilatory motive on the part of the movant. See also Triplett v. LaFlore County, 712 F.2d 444, 446 (10th Cir. 1983) (undue delay can be the reason for refusal to grant leave to amend).

In First City Bank, 820 F.2d at 1133, the court noted that prejudice to the opposing party need not be shown, and that a district court acts within the bounds of its discretion

when it denies leave to amend for "untimeliness" or "undue delay." See also Woolsey v. Marion Laboratories, Inc., 934 F.2d 1452, 1462 (10th Cir. 1987) (while prejudice may be one ground justifying a denial of leave to amend, such a showing is not necessary); Las Vegas Ice and Cold Storage Co. v. Far West Bank, 893 F.2d 1182, 1185 (10th Cir. 1990) ("Untimeliness alone may be a sufficient basis for denial of leave to amend."); and A.E. v. Mitchell, 724 F.2d 864, 868-89 (10th Cir. 1984) (where district court filed order denying injunctive relief in June 1980, and plaintiffs did not seek leave to amend their complaint until May, 1981, no abuse of discretion in refusing leave to amend).

In 6 Charles A. Wright, Arthur R. Miller, & Richard Kane, Federal Practice and Procedure, § 1488 at 659 (1990), it is stated:

> Nonetheless, in keeping with the purpose of Rule

> 15(a), which is to facilitate a determination of action on the merits, a motion to amend should be made as soon as the necessity for altering the pleading becomes apparent. A party who delays seeking an amendment is acting contrary to the spirit of the rule and runs the risk of the court denying permission because of the passage of time.

(footnote omitted).

This treatise also notes that the moving party's failure to include the proposed amendment in its original pleading may put the opposing party to the added burden of further expense, "thereby prejudicing his right to a speedy and inexpensive trial on the merits." Id. at 673-74. Professor Wright's treatise also states that the decision whether to permit leave to amend may depend on the reason or the basis for the inaction, and leave will be granted if the party seeking such

demonstrates that the delay was not excessive or excusable. Id. at 678-82. Furthermore, the court may deny leave to amend when the "moving party knew about the facts on which the proposed amendment was based but omitted the necessary allegations from the original pleadings." (footnote omitted). Id. at 682-88.

In the present case, Elliott gave the district court no acceptable reason why she had been so dilatory in presenting the claims in the proposed Amended Complaint in a timely fashion. She only made vague references to "an extreme workload and conflicting court schedules." In her brief filed with this court, Elliott gave the same reason for the inaction.

Moreland, a public servant who obviously was distracted from her duties by the inexcusable and inadequately explained neglect

by Elliott, contends that there was a blatant abuse of the district court's resources, and a waste of money in defending the lawsuit.[4]

In Foman v. Davis, 373 U.S. 178, 182 (1962), this Court set forth that the justifications for motions to amend under Fed. R. Civ. P. 15(a) were undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party and futility of amendment. In following the opinion of this Court and ruling that undue delay alone is sufficient to justify leave to amend, the Tenth Circuit Court of Appeals is consistent with the decisions of other courts of appeals in their interpretation of Fed. R. Civ. P. 15(a).

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[4]Ms. Moreland retired from her position as County Clerk of Washington County in December, 1991.

The Eleventh Circuit court of appeals has also issued an opinion consistent with the Tenth Circuit. In Oxford Furniture v. Drexel Heritage Furnishings, 984 F.2d 1119, 1124 (11th Cir. 1993), the court of appeals for the Eleventh Circuit ruled that the district court did not abuse its discretion in denying the defendant's motion to amend its answer. The court stated that the defendant gave no reason for waiting to raise the statute of frauds defense ten months after the plaintiff's complaint and seven days before the pretrial conference. Id. See also Quaker State Oil Refining v.Garrity Oil Co., 884 F.2d 1510, 1517-18 (1st Cir. 1989) (court of appeals upheld district court's denial of amendment noting that the movant's tardiness was extreme and stating that "[p]arties seeking the benefit of the rule's liberality have an obligation to exercise due diligence."). In

Quaker State, the court also stated that "[t]he facts upon which the proposed counterclaim rested were known to [movant] all along . . . " and "[m]ost important, [movant] never proffered a satisfactory explanation for its delay." Id. In Berger v. Edgewater Steel Co., 911 F.2d 911, 924 (3d Cir. 1990), the court held that the district court did not abuse its discretion in denying the motion, when amendment would bring new issues into the case and it came four and one-half months after the information on which it was based became available and after the close of an extended discovery period; See also Amendola v. Bayer, 907 F.2d 760, 764 (7th Cir. 1990) (district court did not abuse its discretion in denying motion to amend where movant's delay in his attempt to amend was inexcusable and discovery had been conducted for over 19 months and he failed to tender any reason for

his failure to seek leave to amend).

In her Petition for Writ of Certiorari, the Petitioner relies on opinions from the Fifth, Sixth, Eighth, and Ninth Circuit Courts of Appeals, as well as the District of Columbia. The facts in each of these opinions reveal that the courts' decisions to deny leave to amend are consistent with the opinions enunciated by the Tenth Circuit.

In Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594 (5th Cir. 1981), the court decided that there was no substantial reason to deny leave to amend. Id. at 598. The cause of action in Dussouy was based on conspiracy. The plaintiff voluntarily dismissed one of the defendants as a party unnecessary to the lawsuit and 41 days after entry of the dismissal moved to amend his complaint. Id. at 599. The court of appeals viewed the voluntary dismissal as the factor that

necessitated the amendment, and found the delay reasonable based on these circumstances. Id. The court noted that the deficiencies that were cured with the plaintiff's second amendment stemmed from the voluntary dismissal, and that the remaining defendant would not be prejudiced by the amendment because the challenged conduct was essentially the same as that challenged in the initial pleadings. Id. The court in Dussouy stated that "[i]n other circumstances, awareness of facts and failure to include them in the complaint might give rise to the inference that the plaintiff was engaging in tactical maneuvers to force the court to consider various theories seriatim. In such a case . . . denial of leave to amend on the grounds of bad faith may be appropriate." Id. The court also stated that denial of leave to amend is appropriate when failure to include a known

theory is not from an attempt to gain tactical advantage but from a reasonable belief that the theory is unnecessary. Id.

In Tefft v. Seward, 689 F.2d 637, 639 (6th Cir. 1982), the original complaint was filed on January 28, 1976. In late 1980, the plaintiff moved to amend his complaint to allege a cause of action based on a constitutional tort instead of assault and battery. The court of appeals held that there was no particular "undue" delay considering the course of the case through a prior appeal to the Sixth Circuit. Id. The court based its decision on the theory that the plaintiff should have been granted leave to amend his complaint because his original attempt to amend was plain from the language in his response to the defendants' motion for summary judgment, and the facts set forth in the original complaint would support a cause of

action for a constitutional tort as well as assault and battery. Id.

In Chesnut v. St. Louis County, Mo., 656 F.2d 343, 349 (8th Cir. 1981), the Eighth Circuit Court of Appeals ruled that the district court should have allowed the plaintiff's motion for leave to amend the complaint to add a party plaintiff. In so ruling, the court noted that the motion was made simultaneously with the plaintiff's cross motion for summary judgment and at that time, granting the motion would not have prejudiced the defendant. Id. The court also addressed that the defendant had supported some of its pleadings and motions prior to that point in the case assuming the party to be added was already a party, and that at no time did the defendant resist the motion for leave to amend. Id.

In Hurn v. Retirement Fund Trust of

Plumbing, Etc., 648 F.2d 1252 (9th Cir. 1981), the court of appeals stated that the district court did not provide a statement of reasons justifying the denial and no reason readily apparent on the record justified the district court's denial of amendment over two years after the original complaint was filed. Id. at 1254. The court stated that there was no prejudice because the operative facts remained the same. Id. In Yellow Bus Lines, Inc. v. Local Union 639, 883 F.2d 132 (D.C. Cir. 1989), the court ruled that none of the reasons recognized in Foman justified denial of the plaintiff's motion to amend. The court stated that only two months elapsed between the hearing at which the court first expressed doubts about the deficiencies of the original pleading and the plaintiff's request to amend those pleadings. Id. at 145. The court also recognized that the trial was more than eight

months away, and that the plaintiff moved with more than reasonable alacrity to correct its pleadings and ample time was available to the defendants for trial preparation. Id.

In each of the opinions relied upon by the Petitioner in the present case, the courts of appeals found that leave to amend should have been granted reasoning that the movants had either already attempted an amendment, made the amendment simultaneously with another pleading, or the plaintiff voluntarily dismissed a defendant which necessitated the amendment, and in one case, there was no resistance from the nonmovant. The facts of these cases are distinguishable from the present case making the rulings of these circuits consistent with the decisions of the Tenth Circuit. In the present case, not only did the Petitioner wait until one year after the dismissal of her case, but prior to that

time she did not respond to the Respondents' Motion to Dismiss. Also, the Petitioner failed to follow the district court's orders. The Tenth Circuit and the district court were correct in deciding that the Petitioner's Motion to Amend was justifiably denied based upon undue delay as set forth in Foman v. Davis, 373 U.S. 178, 182 (1962).

CONCLUSION

Moreland contends that the Tenth Circuit opinion is consistent with that of other courts of appeals, the district court did not abuse its discretion by refusing to grant Elliott's Request to File an Amended Complaint, and asks this Court to deny Elliott's Petition.

Respectfully submitted,

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